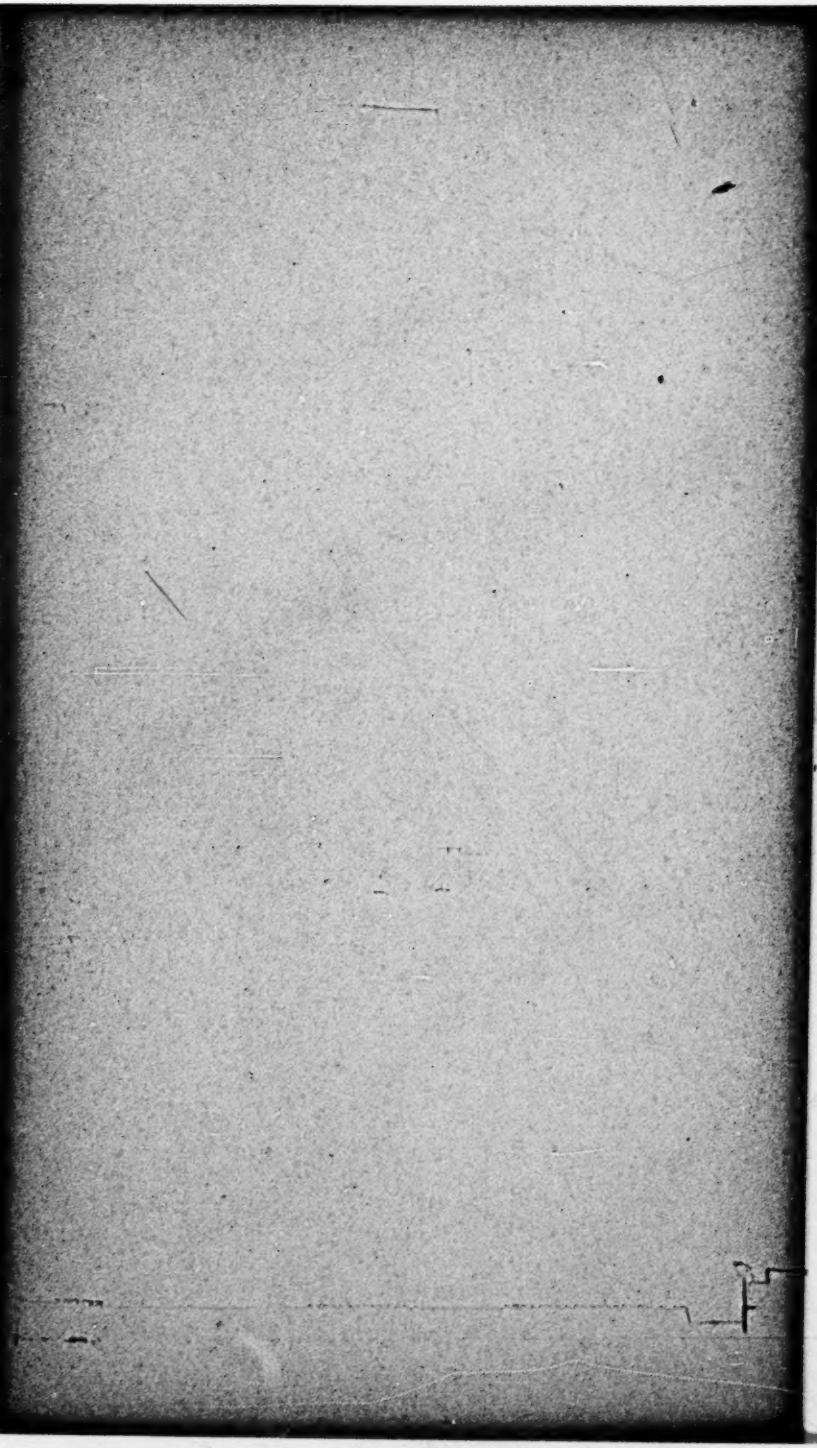


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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-452

TWENTIETH CENTURY MUSIC CORPORATION and MARY M. BOURNE,

Petitioners,

v.

GEORGE AIKEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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v.

GEORGE AIKEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners Twentieth Century Music Corporation and Mary M. Bourne ask that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on June 21, 1974.

Opinions Below

The opinion of the Court of Appeals, not yet officially reported, is annexed hereto as Appendix A. The opinion of the United States District Court for the Western District of Pennsylvania is reported at 356 F. Supp. 271 (1973), and is annexed hereto as Appendix B.

Jurisdiction

The judgment of the Court of Appeals (Appendix C) was entered on June 21, 1974. On September 11, 1974, Mr. Justice Brennan extended the time to file this petition until October 18, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Jurisdiction in the District Court was based on 28 U.S.C. §1338.

Questions Presented

Over 5,000 commercial establishments entertain their customers and employees with radio music sent over loudspeakers and are licensed and agree to pay nearly one-quarter million dollars each year to the composers, authors and music publishers of these copyrighted musical compositions. They do so because in 1931, in a unanimous opinion by Mr. Justice Brandeis, this Court held that when a commercial establishment makes available to its customers musical compositions transmitted by a broadcaster through the instrumentality of a radio receiver and loudspeakers installed by the establishment and wholly under its control, it "performs" those compositions publicly for profit within the meaning of Section 1 of the Copyright Act of 1909, now 17 U.S.C. §1(e). *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931).*

The court below refused to apply this Supreme Court decision on identical facts (except that the establishment

* Another two million dollars in license fees are paid by background music operators like Muzak who service some 75,000 additional commercial establishments—arrangements that might be jeopardized were radio broadcast music available free of any license obligation.

was a restaurant rather than a hotel), on the ground that two recent decisions of this Court, *Fortnightly Corp.* v. *United Artists,* 392 U.S. 390 (1968), and *Teleprompter Corp.* v. *CBS,* 415 U.S. 394 (1974), had, albeit without saying so, consigned *Jewell-LaSalle* to the dustbin of history. In so doing, the court below misconstrued *Fortnightly* and *Teleprompter,* undermined an important rule of law established four decades ago and jeopardized the material well-being of America's composers, authors and music publishers who have come to depend upon the business relationships that have evolved in reliance upon *Jewell-LaSalle.*

The questions presented are as follows:

1. Should not this Court protect the integrity of its unanimous decision in *Jewell-LaSalle,* which, although "confined to its facts" in recent years by a majority of this Court, has not been overruled?

2. Should not *Fortnightly* and *Teleprompter* be construed in the context of the new industry (CATV) out of which those decisions arose, and not unnecessarily extended to the music world in a way that would disrupt important business relationships that have evolved in fair and reasonable reliance upon *Jewell-LaSalle*?

3. Where the ultimate question is whether there has been a "performance," must the conclusion reached for those like CATV systems who do little more than enhance signals received on a viewer's own television set in the privacy of his own home, be ruthlessly applied to commercial establishments that use loudspeakers to exploit radio broadcasts to satisfy and entertain customers and employees in such public places as hotels and restaurants?

4. When a restaurant owner provides music by means of a radio and loudspeakers to enhance the atmosphere of his establishment and entertain customers and employees, are not these acts the equivalent of providing music by records, tapes, background music services or live orchestras, and therefore a "performance" under the "functional" test enunciated by this Court in *Fortnightly* and *Teleprompter*?

5. If it has been, since 1931, a "performance" within the meaning of the Copyright Act for a commercial establishment to receive radio broadcasts of copyrighted musical compositions and to entertain customers with them over loudspeakers under its control; if a vital industry has grown up in the past 40 years in legitimate reliance upon that ruling; and if Congress has not only repeatedly declined to reject that rule but has incorporated it in major proposed revisions to the copyright laws, is it not still a "performance" for a commercial establishment to do the same thing today?

6. To the extent that this Court spared the new CATV industry copyright liability because it did not want to upset the economic status quo by exposing it retroactively to a burden not previously borne, should not this Court reach a different result with respect to music, where there are long-established practices that have developed in good faith reliance upon the proposition that commercial establishments *are* liable for copyright infringement when they receive copyrighted musical compositions broadcast by others and make them available to their customers and employees over loudspeakers?

Statute Involved

Section 1 of the Copyright Act, 17 U.S.C. §1, provides in pertinent part:

> "§1 Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:
>
> * * *
>
> (e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpuse of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced. * * * And as a condition of extending the copyright control to such mechanical reproductions, that whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of 2 cents on each such part manufactured, to be paid by the manufacturer thereof. * * * The payment of the royalty provided for by this section shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit. * * *"

Statement of the Case

Respondent George Aiken owns and operates a chain of fast food restaurants in Pittsburgh, Pennsylvania. On March 11, 1972, customers and employees in one of his restaurants were entertained by renditions of two popular

musical compositions: "The More I See You," whose copyright proprietor is petitioner Twentieth Century Music Corporation, and "Me and My Shadow" whose copyright proprietor is petitioner Mary M. Bourne.

These two songs were broadcast that day by Pittsburgh radio station WKJF-FM, a licensee of the American Society of Composers, Authors and Publishers ("ASCAP"), of which organization petitioners are members.* The broadcasts were received upon a radio receiver in Aiken's establishment and transmitted over five loudspeakers. It was Aiken's practice to turn his receiver on each morning and thus to entertain his customers and employees throughout the day.

Some 5,150 similar establishments employing radio receivers and loudspeakers to entertain customers and employees are licensed by ASCAP to perform the entire repertory of music whose copyrights are held by ASCAP members. The cost of such a license for Aiken's establishment is $5 a month. The same license that permits the use of radio music also authorizes the use of tapes and recorded music without additional payment. Another 75,000 establishments use background music whose purveyors such as Muzak are licensed by ASCAP to provide such

* ASCAP was organized in 1914 as a non-profit unincorporated association—essentially a cooperative of authors, composers and music publishers—to prevent piracy and to license performing rights of its members' musical compositions. The amended final judgment in *United States* v. *ASCAP*, 1950 Trade Cases ¶62,595, requires that its fees be reasonable, nondiscriminatory and uniform, and provides a simple judicial remedy for a party who questions the reasonableness of the ASCAP rates. Since 1941 ASCAP's licenses with broadcasters have expressly negated any right on the part of the broadcaster to license receivers of a broadcast to perform publicly for profit.

music by wire or multiplex FM.* License agreements of the kind described have been continually in effect since 1941 as a result of negotiations between ASCAP, the broadcasting industry and commercial users of copyrighted music.

The District Court found that these long established business relationships yield $2,346,000 annually in fees to ASCAP for its member composers, authors and music publishers—$246,000 paid by those using radios and loudspeakers, and $2,100,000 from the Muzak-type licenses.

Petitioners brought suit in the United States District Court in the Western District of Pennsylvania to restrain Aiken's infringement of their copyrights and for the $250 statutory penalty. The trial court granted the monetary relief sought. It found that Aiken had done precisely that which this Court held in *Jewell-LaSalle* was a public "performance" for profit requiring a license. It found that failure to follow this Court's 1931 decision would jeopardize established business relationships that had developed in legitimate reliance upon that decision; commercial establishments would discontinue paying license fees to use broadcast music, and the fees which Muzak and similar services now pay for their rights might be adversely affected. The District Court held that a contrary result was not required by this Court's decision in *Fortnightly Corp.* v. *United Artists,* 392 U.S. 390 (1968). It noted that

* Although the decision below does not directly affect the Muzak-type licenses, Muzak and its franchisees did assert the position below that they will seek a substantial fee reduction if *Jewell-LaSalle* is overruled on the theory that establishments would not pay as much for background music as they do now if they can obtain free radio music.

this Court had discussed *Jewell-LaSalle,* but had declined to overrule it, and that whereas the present plaintiffs sought to protect long established business relationships, the *Fortnightly* plaintiffs sought to impose a new kind of liability upon a new industry.

The United States Court of Appeals for the Third Circuit reversed. It did not dispute that *Jewell-LaSalle* appeared to require affirmance of the trial court's decision. Indeed, it conceded that the trial court "was faced with an 'all fours' decision in" *Jewell* v. *LaSalle.* (App. A, p. 17). But it held that *Fortnightly,* as amplified in *Teleprompter Corp.* v. *CBS,* 415 U.S. 394 (1974), changed the meaning of the word "performance" even where *Jewell-LaSalle* previously governed, and that under *Fortnightly* and *Teleprompter,* what Aiken did in his restaurant was no longer a "performance" within the meaning of the Copyright Act.

Reasons for Granting the Writ

I. The decision below conflicts directly with a unanimous decision of this Court.

A. The court below expressly refused to follow a unanimous decision of this Court.

As the court below conceded, the present case is on "all fours" with *Jewell-LaSalle.* (App. A, p. 17). The only difference is that this one involves a restaurant whereas *Jewell-LaSalle* involved a hotel.* In *Jewell-La-*

* The trial court here found as a fact that the rule in *Jewell-LaSalle* had been consistently applied to restaurants as well as hotels for over 30 years, and that both kinds of establishments had routinely entered into licenses with ASCAP since 1941, despite contrary intimations in *Nimmer on Copyright* §107.41, n. 204 (1968), cited in *Fortnightly,* 392 U.S. at 405, n. 3. (App. B, p. 6)

Salle a unanimous court, speaking through Mr. Justice Brandeis, held in response to a certified question that there was a "performance" within the meaning of Section 1 of the Copyright Act of 1909 when a commercial establishment made available to its customers copyrighted musical compositions by means of a radio receiver and transmitted through loudspeakers installed by the establishment and wholly under its control. Those are the facts here.

The two cases cannot be distinguished, as respondent's counsel have suggested, on the ground that in *Jewell-LaSalle* the broadcaster was itself unlicensed. Mr. Justice Brandeis indicated that this fact eliminated from the case the issue of whether there was an implied license for the benefit of the receiver. Since 1941, the form of license used by ASCAP expressly negates that possibility. In any event, the question certified in *Jewell-LaSalle* was whether certain acts constituted a "performance" within the meaning of the Act—a question wholly unrelated to whether there was a license or an implied license.

If *Jewell-LaSalle* remains the law—even if only upon its own facts—the decision of the Court of Appeals is erroneous and the decision of the trial court must be reinstated.

B. This Court has not overruled its unanimous decision in *Jewell-LaSalle*.

In attempting to adapt the language of the Copyright Act of 1909 to the novel technological circumstances presented by the CATV television industry, a majority of the members of this Court in 1968 felt constrained to fashion a fuctional test of "performance" as applied to this new

technology. In *Fortnightly Corp.* v. *United Artists*, the question was whether there was a "performance" within the meaning of the Act when a CATV system intercepted a television signal and functioned as an antenna, enhancing its subscribers' ability to receive that signal on their own television receivers in the privacy of their own homes. The CATV industry was a new one. It had never recognized any obligation to pay license fees to the copyright proprietors of the materials intercepted; not one cent had ever been paid by the CATV industry to a copyright proprietor. 392 U.S. at 401 n. 30.

At issue, as this Court expressly recognized, was whether such liability should newly be established and applied retroactively. The Court declined to extend the rationale of *Jewell-LaSalle* to these new facts; indeed, it said that the 1931 landmark "must be understood as limited to its own facts." 392 U.S. at 397 n. 18. For purposes of determining CATV liability, it concluded that the question was whether CATV was "functionally" more like the "passive" viewer than the "active" broadcaster. So defining the problem, it ruled against liability.

In effect, *Fortnightly* resolved the issue in favor of the economic status quo—freezing the present situation in which CATV was totally outside the copyright system. Mr. Justice Fortas dissented. Three members of the Court, Justices Douglas, Marshall and Harlan, did not participate.

In 1974 the Court was asked to decide whether the rationale of *Fortnightly* reached other facets of CATV operations, and once again it resolved the matter in favor of the economic status quo. The new case, *Teleprompter*

Corp. v. *CBS,* involved interception of distant signals not otherwise receivable by subscribers on their own sets in their own homes. A majority of the Court, the Chief Justice and Justices Douglas and Blackmun dissenting, resolved the question in favor of the CATV industry, which had still not paid any license fees to copyright proprietors. Once again, the Court chose not to disrupt existing economic patterns—leaving to Congress the question whether to create liability where before there had been none. Once again, *Jewell-LaSalle* was not overruled; it was simply not applied to these aspects of the CATV industry.

No member of this Court has ever asserted that *Jewell-LaSalle* should be overruled insofar as it applies to the reception of radio signals in a commercial establishment which makes those signals available to customers and employees over loudspeakers. No Justice has ever written that composers, lyricists and music publishers should go unpaid when hotels and restaurants exploit their copyrighted compositions for profit-making purposes. It was, therefore, the duty of the court below to honor *Jewell-LaSalle.* Only this Court has the power and the responsibility to overrule its prior decisions. It is an established purpose of the certiorari jurisdiction to confine lower courts to their proper function and to reserve to this Court the power to overrule. A writ should be granted for that purpose. Sup. Ct. Rule 19(1)(b); Stern & Gressman, Supreme Court Practice §4.5, pp. 158-159 (1969).

II. The court below misconstrued this Court's decisions in *Fortnightly* and *Teleprompter*.

This Court's cable decisions do not compel the conclusion that Aiken did not publicly "perform" for profit petitioners' copyrighted compositions. Unlike the facts in the cable cases, where each subscriber owns his own television set and the cable systems merely enhance the capacity of those private sets to receive—in the privacy of the subscriber's own home—programs broadcast by television stations, none of the members of the public present in Aiken's restaurant was listening to his own radio. Instead, Aiken had installed a radio and loudspeakers for the purpose of making his restaurant more attractive for his patrons as a place to eat and for his employees as a place to work. By installing and controlling his own radio equipment and loudspeakers in order to enhance the atmosphere of his restaurant, Aiken functioned as an "active" public performer; his role was functionally equivalent to that of a proprietor of a restaurant or hotel who plays records or tapes, subscribes to a background music service, or hires an orchestra to play copyrighted compositions. These functions clearly entail liability for copyright infringement. See *Chappell & Co.* v. *Middletown Farmers Market & Auction Co.*, 334 F. 2d 303 (3rd Cir. 1964) (records); *Leo Feist, Inc.* v. *Lew Tendler Tavern, Inc.*, 267 F. 2d 495 (3rd Cir. 1959) (background music service); and *Herbert* v. *Shanley Co.*, 242 U.S. 591 (1917) (use of a live orchestra).

In no event should an unreviewed decision of a federal appellate court be permitted to cut such a wide swath

through copyright law on the basis of an overblown application—indeed, a misapplication—of *Fortnightly* and *Teleprompter*.

III. Because long established business relationships have developed in full and fair reliance on this Court's decision in *Jewell-LaSalle*, its viability should not be destroyed without plenary review in this Court.

A. The decision below, if unreviewed, will disrupt important reliance interests.

The trial court found, and the record establishes without contradiction, that significant economic interests have developed in legitimate reliance upon this Court's decision in *Jewell-LaSalle*. If the decision below stands, the 5,150 establishments that have agreed to pay a modest monthly license fee to entertain their patrons with copyrighted music would have no reason to continue paying those fees. Authors, composers and publishers would thus be deprived of a quarter million dollars each year which they receive through ASCAP. Moreover, as the trial court found, arrangements whereby 75,000 commercial establishments now use ASCAP licensed background music yielding over $2 million in license fees might also be jeopardized; the background music operators asserted below that their subscribers would find little reason to pay for their music when similar music broadcast by radio could be freely used for the entertainment of customers.* The

* The trial court explained, 356 F. Supp. at 273, that Muzak, its franchisees and other background music operators have pending a request to modify fees before the court administering the ASCAP decree (the decree provides that where the parties cannot agree on fees, the court will set them), and that a decision in this case adverse to ASCAP might have an effect upon the fee level. (App. B, p. 4).

trial court found, and the record establishes, that since *Jewell-LaSalle*, complicated contractual arrangements have evolved under which commercial establishments using music to entertain customers and employees have paid millions of dollars in license fees to the artists who created that music. (App. B, pp. 3-4). Indeed, Muzak asserted below that the decision in this case will

> "in significant measure influence the price the public pays for background music whatever the source." (App. A, p. 5).

B. *Jewell-LaSalle* should be adhered to in order to vindicate these reliance interests.

First, as argued above, there is a great difference in the normal function served by CATV (boosting signals and transmitting them to a viewer's own set, to be seen in the privacy of his own home) and the function served by hotel keepers and restaurateurs who use radio music over loudspeaker systems to please and entertain customers and employees in such public places as hotels and restaurants. In the latter context, *Jewell-LaSalle* was and remains correct.

Second, it would be no anomaly were this Court to hold that the word "performance" may have one application with respect to CATV and another with respect to copyrighted musical compositions received on radios and carried by loudspeakers throughout public establishments. It has been this Court's policy, when economic interests develop in fair and reasonable reliance upon decisions of this Court, honorably to vindicate that reliance interest while remaining free to apply other interpretations to other industries. Compare what might be termed the "grandfather" treatment afforded baseball in *Flood* v. *Kuhn*, 407

U.S. 258 (1972), with that dealt to football in *Radovich* v. *National Football League*, 352 U.S. 445 (1957), to boxing in *United States* v. *International Boxing Club*, 348 U.S. 236 (1955), and to the theatre in *United States* v. *Schubert*, 348 U.S. 222 (1955). In music, as in baseball, the "slate is not clean," and has not been so for nearly half a century. Cf. *Flood* v. *Kuhn*, 407 U.S. at 283.

C. The history of congressional action supports adherence to *Jewell-LaSalle*.

It is particularly appropriate for this Court honorably to vindicate a reliance interest where a long history of congressional action provides support for the precedent relied upon. That is the case here. Since 1931 Congress has 19 times amended the Copyright Act, without overruling *Jewell-LaSalle*. In the years following *Jewell-LaSalle*, some 18 proposals to reverse its interpretation of the Copyright Act were introduced in Congress. None passed. Moreover, in recent years, Congress has fully accepted *Jewell-LaSalle* and incorporated its rationale in proposals to revise the copyright laws. Congress is presently considering a major overhaul of the copyright laws. Each major bill that has received any support in the Congress, including those bills that have passed either House, has carefully embodied the *Jewell-LaSalle* approach, as reflected in the contractual arrangements actually negotiated by ASCAP with the broadcast industry and with commercial establishments since 1941.

Bills drafted both before and after this Court's decisions in *Fortnightly* and *Teleprompter* provide that there *shall* be copyright liability when a commercial establishment receives copyrighted musical material upon a radio receiver and makes it available to customers and employ-

ees through loudspeakers. Consistent with ASCAP's long standing licensing practices,* the only commercial establishments free of liability under these bills are those—such as "Mom and Pop" stores—that employ single radio receivers like the ones used in ordinary homes without any additional loudspeakers. See, for example, Section 110(5) of H.R. 2512, passed by the House of Representatives in 1967 and Section 110(5) of S. 1361, which passed the Senate as recently as September 9, 1974. CATV, on the other hand, has been treated entirely separately—and quite differently—by Congress. See Section 111 of each of the aforementioned bills. Apparently the alleged "anomaly" that the court below could not accept makes sense to the lawmakers. There plainly is here, as there was in *Flood*, more than "mere Congressional silence and passivity," to support adherence to precedent. *Flood* v. *Kuhn*, 407 U.S. at 293.** Other instances in which this Court has relied upon congressional action or inaction as the basis for adhering to subsequently challenged rulings include *Canada Packers, Ltd.* v. *Atchison, T. & S. F. R. Co.*, 385 U.S. 182, 184 (1966) (Congress had not acted to overrule the Court); *Joint Industry Board* v. *United States*, 391 U.S. 224, 228-29 (1967) (the Court adhered to a 1959 decision where Congress has frequently amended the statute but has not enacted proposals to reverse the Court); *Walling* v. *Halliburton Co.*, 331 U.S. 17, 25 (1947) (Congress has let the decision stand and the parties "have regulated their affairs on the faith of it.")

* ASCAP has never required a license from establishments where a home-type radio receiver is used without being hooked up to a loudspeaker system.

** Indeed, whereas in *Flood* baseball had known for a quarter century that Congress might accept the Court's blunt invitation to strip it of antitrust immunity, in the present case there was no reason to believe after 1941 that either Court or Congress would repudiate *Jewell-LaSalle*.

Conclusion

The decision below not only purports to overrule a decision of this Court and misconstrues two other decisions, but it also threatens the economic health of music in America, not so hardy and resilient an industry as steel or electric power, but one of central importance to the Nation's cultural life. No one knows precisely what combination of factors makes for creativity in music, but the intricate financial arrangements that have grown up in the wake of *Jewell-LaSalle* no doubt play some part. Composers, authors and publishers must, after all, eat as well as make music. This Court should not lightly permit lower federal tribunals to discard unanimous Supreme Court decisions upon which our music-makers have fairly and reasonably come to rely for their economic well-being. A writ of certiorari should be granted to review the decision below.

Respectfully submitted,

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